

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4915

BY DELEGATE WILSON

[Introduced February 11, 2020; Referred to the
Committee on the Judiciary]

1 A BILL to amend and reenact §6B-2-4 of the Code of West Virginia, 1931, as amended, relating
2 to increasing the period for which violations may be considered from one year before the
3 filing of a complaint to 10 years.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. ETHICS COMMISSION, DISCLOSURES, APPEARANCES.

§6B-2-4. Processing complaints; dismissals; hearings; disposition; judicial review.

1 (a) Upon the filing of a complaint, the executive director of the commission or his or her
2 designee shall, within three working days, acknowledge the receipt of the complaint by first-class
3 mail unless the complaint was initiated by the commission or the complainant or his or her
4 representative personally filed the complaint with the commission and was given a receipt or other
5 acknowledgment evidencing the filing of the complaint. No political party or officer, employee or
6 agent of a political party acting in his or her official capacity may file a complaint for a violation of
7 this chapter with the commission. Nothing in this section prohibits a private citizen, acting in that
8 capacity, from filing a verified complaint with the commission under this section. Within 14 days
9 after the receipt of a complaint, the executive director shall refer the complaint to the Review
10 Board created pursuant to section two-a of this article.

11 (b) Upon the referral of a complaint by the executive director pursuant to subsection (a) of
12 this section, the Review Board shall determine whether the allegations of the complaint, if taken
13 as true, would constitute a violation of law upon which the commission could properly act under
14 the provisions of this chapter. If the complaint is determined by a majority vote of the Review
15 Board to be insufficient in this regard, the Review Board shall dismiss the complaint.

16 (c) Upon a finding by the Review Board that the complaint is sufficient, the executive
17 director shall give notice of a pending investigation to the complainant, if any, and to the
18 respondent. The notice of investigation shall be mailed to the parties and, in the case of the
19 respondent, shall be mailed as certified mail, return receipt requested, marked "Addressee only,
20 personal and confidential". The notice shall describe the conduct of the respondent which is

21 alleged to violate the law and a copy of the complaint shall be appended to the notice mailed to
22 the respondent. Each notice of investigation shall inform the respondent that the purpose of the
23 investigation is to determine whether probable cause exists to believe that a violation of law has
24 occurred which may subject the respondent to administrative sanctions by the commission,
25 criminal prosecution by the state, or civil liability. The notice shall further inform the respondent
26 that he or she has a right to appear before the Review Board and that he or she may respond in
27 writing to the commission within 30 days after the receipt of the notice, but that no fact or allegation
28 shall be taken as admitted by a failure or refusal to timely respond.

29 (d) Within the 45-day period following the mailing of a notice of investigation, the Review
30 Board shall proceed to consider: (1) The allegations raised in the complaint; (2) any timely
31 received written response of the respondent; and (3) any other competent evidence gathered by
32 or submitted to the Review Board which has a proper bearing on the issue of probable cause. A
33 respondent may appear before the Review Board and make an oral response to the complaint.
34 The commission shall promulgate rules prescribing the manner in which a respondent may
35 present his or her oral response. The commission and Review Board may ask a respondent to
36 disclose specific amounts received from a source and request other detailed information not
37 otherwise required to be set forth in a statement or report filed under the provisions of this chapter
38 if the information sought is considered to be probative as to the issues raised by a complaint or
39 an investigation initiated by the commission. Any information thus received shall be confidential
40 except as provided by subsection (f) of this section. If a person asked to provide information fails
41 or refuses to furnish the information to the commission or Review Board, the commission or
42 Review Board may exercise their subpoena power as provided in this chapter and any subpoena
43 issued by the commission or Review Board shall have the same force and effect as a subpoena
44 issued by a circuit court of this state. Enforcement of any subpoena may be had upon application
45 to a circuit court of the county in which the Review Board is conducting an investigation through
46 the issuance of a rule or an attachment against the respondent as in cases of contempt.

47 (e) Unless consented to by both the respondent and complainant, or unless the
48 commission makes a good cause determination in writing the investigation and a determination
49 as to probable cause shall not exceed 18 months.

50 (f) (1) All investigations, complaints, reports, records, proceedings and other information
51 received by the commission or Review Board and related to complaints made to the commission
52 or investigations conducted by the commission or Review Board pursuant to this section, including
53 the identity of the complainant or respondent, are confidential and may not be knowingly and
54 improperly disclosed by any current or former member or employee of the commission or the
55 Review Board except as follows:

56 (A) Once there has been a finding that probable cause exists to believe that a respondent
57 has violated the provisions of this chapter and the respondent has been served by the commission
58 with a copy of the Review Board's order and the statement of charges prepared pursuant to the
59 provisions of subsection (h) of this section, the complaint and all reports, records, nonprivileged
60 and nondeliberative material introduced at any probable cause hearing held pursuant to the
61 complaint cease to be confidential.

62 (B) After a finding of probable cause, any subsequent hearing held in the matter for the
63 purpose of receiving evidence or the arguments of the parties or their representatives shall be
64 open to the public and all reports, records and nondeliberative materials introduced into evidence
65 at the hearing, as well as the commission's orders, are not confidential.

66 (C) The commission may release any information relating to an investigation at any time
67 if the release has been agreed to in writing by the respondent.

68 (D) The complaint and the identity of the complainant shall be disclosed to a person named
69 as respondent immediately upon the respondent's request.

70 (E) Where the commission is otherwise required by the provisions of this chapter to
71 disclose information or to proceed in such a manner that disclosure is necessary and required to
72 fulfill those requirements.

73 (2) If, in a specific case, the commission finds that there is a reasonable likelihood that the
74 dissemination of information or opinion in connection with a pending or imminent proceeding will
75 interfere with a fair hearing or otherwise prejudice the due administration of justice, the
76 commission shall order that all or a portion of the information communicated to the commission
77 to cause an investigation and all allegations of ethical misconduct or criminal acts contained in a
78 complaint shall be confidential and the person providing the information or filing a complaint shall
79 be bound to confidentiality until further order of the commission.

80 (g) If the members of the Review Board fail to find probable cause, the proceedings shall
81 be dismissed by the commission in an order signed by the members of the Review Board. Copies
82 of the order of dismissal shall be sent to the complainant and served upon the respondent
83 forthwith. If the Review Board decides by a unanimous vote that there is probable cause to believe
84 that a violation under this chapter has occurred, the members of the Review Board shall sign an
85 order directing the commission staff to prepare a statement of charges and assign the matter for
86 hearing to the commission or a hearing examiner as the commission may subsequently direct.
87 The commission shall then schedule a hearing, to be held within 90 days after the date of the
88 order, to determine the truth or falsity of the charges. The commission's review of the evidence
89 presented shall be de novo. For the purpose of this section, service of process upon the
90 respondent is obtained at the time the respondent or the respondent's agent physically receives
91 the process, regardless of whether the service of process is in person or by certified mail.

92 (h) At least 80 days prior to the date of the hearing, the commission shall serve the
93 respondent by certified mail, return receipt requested, with the statement of charges and a notice
94 of hearing setting forth the date, time and place for the hearing. The scheduled hearing may be
95 continued only upon a showing of good cause by the respondent or under other circumstances
96 as the commission, by legislative rule, directs.

97 (i) The commission may sit as a hearing board to adjudicate the case or may permit an
98 assigned hearing examiner employed by the commission to preside at the taking of evidence.

99 The commission shall, by legislative rule, establish the general qualifications for hearing
100 examiners. The legislative rule shall also contain provisions which ensure that the functions of a
101 hearing examiner will be conducted in an impartial manner and describe the circumstances and
102 procedures for disqualification of hearing examiners.

103 (j) A member of the commission or a hearing examiner presiding at a hearing may:

104 (1) Administer oaths and affirmations, compel the attendance of witnesses and the
105 production of documents, examine witnesses and parties and otherwise take testimony and
106 establish a record;

107 (2) Rule on offers of proof and receive relevant evidence;

108 (3) Take depositions or have depositions taken when the ends of justice will be served;

109 (4) Regulate the course of the hearing;

110 (5) Hold conferences for the settlement or simplification of issues by consent of the parties;

111 (6) Dispose of procedural requests or similar matters;

112 (7) Accept stipulated agreements;

113 (8) Take other action authorized by the Ethics Commission consistent with the provisions
114 of this chapter.

115 (k) With respect to allegations of a violation under this chapter, the complainant has the
116 burden of proof. The West Virginia Rules of Evidence governing proceedings in the courts of this
117 state shall be given like effect in hearings held before the commission or a hearing examiner. The
118 commission shall, by rule, regulate the conduct of hearings so as to provide full procedural due
119 process to a respondent. Hearings before a hearing examiner shall be recorded electronically.
120 When requested by either of the parties, the presiding officer shall order a transcript, verified by
121 oath or affirmation, of each hearing held and so recorded. In the discretion of the commission, a
122 record of the proceedings may be made by a certified court reporter. Unless otherwise ordered
123 by the commission, the cost of preparing a transcript shall be paid by the party requesting the
124 transcript. Upon a showing of indigency, the commission may provide a transcript without charge.

125 Within 15 days following the hearing, either party may submit to the hearing examiner that party's
126 proposed findings of fact. The hearing examiner shall thereafter prepare his or her own proposed
127 findings of fact and make copies of the findings available to the parties. The hearing examiner
128 shall then submit the entire record to the commission for final decision.

129 (l) The recording of the hearing or the transcript of testimony, as the case may be, and the
130 exhibits, together with all papers and requests filed in the proceeding, and the proposed findings
131 of fact of the hearing examiner and the parties, constitute the exclusive record for decision by the
132 commission, unless by leave of the commission a party is permitted to submit additional
133 documentary evidence or take and file depositions or otherwise exercise discovery.

134 (m) The commission shall set a time and place for the hearing of arguments by the
135 complainant and respondent, or their respective representatives, and shall notify the parties
136 thereof. Briefs may be filed by the parties in accordance with procedural rules promulgated by the
137 commission. The commission shall issue a final decision in writing within ~~forty-five~~ 45 days of the
138 receipt of the entire record of a hearing held before a hearing examiner or, in the case of an
139 evidentiary hearing held by the commission acting as a hearing board in lieu of a hearing
140 examiner, within ~~twenty-one~~ 21 days following the close of the evidence.

141 (n) A decision on the truth or falsity of the charges against the respondent and a decision
142 to impose sanctions must be approved by at least six members of the commission.

143 (o) Members of the commission shall recuse themselves from a particular case upon their
144 own motion with the approval of the commission or for good cause shown upon motion of a party.
145 The remaining members of the commission may, by majority vote, select a temporary member to
146 replace a recused member: *Provided*, That the temporary member selected to replace a recused
147 member shall be a person of the same status or category, provided by subsection (c), section one
148 of this article, as the recused member.

149 (p) Except for statements made in the course of official duties to explain commission
150 procedures, no member or employee or former member or employee of the commission may

151 make any public or nonpublic comment about any proceeding previously or currently before the
152 commission. Any member or employee or former member or employee of the commission who
153 violates this subsection is subject to the penalties contained in subsection (d), section ten of this
154 article. In addition, violation of this subsection by a current member or employee of the
155 commission is grounds for immediate removal from office or termination of employment.

156 (q) A complainant may be assisted by a member of the commission staff assigned by the
157 commission after a determination of probable cause.

158 (r) No employee of the commission assigned to prosecute a complaint may participate in
159 the commission deliberations or communicate with commission members or the public concerning
160 the merits of a complaint.

161 (s) (1) If the commission finds by clear and convincing evidence that the facts alleged in
162 the complaint are true and constitute a material violation of this chapter, it may impose one or
163 more of the following sanctions:

164 (A) Public reprimand;

165 (B) Cease and desist orders;

166 (C) Orders of restitution for money, things of value, or services taken or received in
167 violation of this chapter;

168 (D) Fines not to exceed \$5,000 per violation; or

169 (E) Reimbursement to the commission for the actual costs of investigating and prosecuting
170 a violation. Any reimbursement ordered by the commission for its costs under this paragraph shall
171 be collected by the commission and deposited into the special revenue account created pursuant
172 to section six, article one of this chapter.

173 (2) In addition to imposing the above-specified sanctions, the commission may
174 recommend to the appropriate governmental body that a respondent be terminated from
175 employment or removed from office.

176 (3) The commission may institute civil proceedings in the circuit court of the county in

177 which a violation occurred for the enforcement of sanctions.

178 (t) At any stage of the proceedings under this section, the commission may enter into a
179 conciliation agreement with a respondent if the agreement is deemed by a majority of the
180 members of the commission to be in the best interest of the state and the respondent. Any
181 conciliation agreement must be disclosed to the public: *Provided*, That negotiations leading to a
182 conciliation agreement, as well as information obtained by the commission during the
183 negotiations, shall remain confidential except as may be otherwise set forth in the agreement.

184 (u) Decisions of the commission involving the issuance of sanctions may be appealed to
185 the circuit court of Kanawha County, only by the respondent and only upon the grounds set forth
186 in ~~section four, article five, chapter twenty-nine-a~~ §29A-5-4 of this code.

187 (v) (1) Any person who in good faith files a verified complaint or any person, official or
188 agency who gives credible information resulting in a formal complaint filed by commission staff is
189 immune from any civil liability that otherwise might result by reason of such actions.

190 (2) If the commission determines, by clear and convincing evidence, that a person filed a
191 complaint or provided information which resulted in an investigation knowing that the material
192 statements in the complaint or the investigation request or the information provided were not true;
193 filed an unsubstantiated complaint or request for an investigation in reckless disregard of the truth
194 or falsity of the statements contained therein; or filed one or more unsubstantiated complaints
195 which constituted abuse of process, the commission shall:

196 (A) Order the complainant or informant to reimburse the respondent for his or her
197 reasonable costs;

198 (B) Order the complainant or informant to reimburse the respondent for his or her
199 reasonable attorney fees; and

200 (C) Order the complainant or informant to reimburse the commission for the actual costs
201 of its investigation. In addition, the commission may decline to process any further complaints
202 brought by the complainant, the initiator of the investigation or the informant.

203 (3) The sanctions authorized in this subsection are not exclusive and do not preclude any
204 other remedies or rights of action the respondent may have against the complainant or informant
205 under the law.

206 (w) (1) If at any stage in the proceedings under this section it appears to a Review Board,
207 a hearing examiner or the commission that there is credible information or evidence that the
208 respondent may have committed a criminal violation, the matter shall be referred to the full
209 commission for its consideration. If, by a vote of two-thirds of the members of the full commission,
210 it is determined that probable cause exists to believe a criminal violation has occurred, the
211 commission shall refer the matter to the appropriate county prosecuting attorney having
212 jurisdiction for a criminal investigation and possible prosecution. Deliberations of the commission
213 with regard to referring a matter for criminal investigation by a prosecuting attorney shall be private
214 and confidential. Notwithstanding any other provision of this article, once a referral for criminal
215 investigation is made under the provisions of this subsection, the ethics proceedings shall be held
216 in abeyance until action on the referred matter is concluded. If the referral of the matter to the
217 prosecuting attorney results in a criminal conviction of the respondent, the commission may
218 resume its investigation or prosecution of the ethics violation, but may not impose a fine as a
219 sanction if a violation is found to have occurred.

220 (2) If fewer than two-thirds of the full commission determine that a criminal violation has
221 occurred, the commission shall remand the matter to the Review Board, the hearing examiner or
222 the commission itself as a hearing board, as the case may be, for further proceedings under this
223 article.

224 (x) The provisions of this section shall apply to violations of this chapter occurring after
225 September 30, 1989, and within ~~one year before the filing of a complaint~~ 10 years before the filing
226 of a complaint: *Provided*, That the applicable statute of limitations for violations which occur on or
227 after July 1, 2005, is two years after the date on which the alleged violation occurred; and
228 *Provided, however*, That the applicable statute of limitations for violations which occur on or after

229 July 1, 2016, is five years after the date on which the alleged violation occurred.

NOTE: The purpose of this bill is to increase the period for which violations may be considered from one year to 10 years before the filing of a complaint.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.